**No. 15-60205**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**GOOGLE, INC.**
*Plaintiff-Appellee*

**VERSUS**

**JAMES HOOD, III, in his official capacity as Attorney General of the State of Mississippi**
*Defendant-Appellant*

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**INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION**

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# BRIEF OF APPELLANT

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**ORAL ARGUMENT REQUESTED**

## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Google, Inc., plaintiff-appellee;
2. Peter Neiman, Violetta G. Watson, Paul Lekas, Patrick J. Carome, Jamie S. Gorelick, Christopher Bouchoux, Chris Johnstone, Blake C. Roberts; Wilmer, Cutler, Pickering, Hale & Dorr, LLP, counsel for plaintiff-appellee;
3. Daniel Mulholland, Fred Krutz, III; Forman, Watkins, Krutz & Tardy, LLP, counsel for plaintiff-appellee;
4. David H. Kramer; Wilson, Sonsini, Goodrich & Rosati, PC, counsel for plaintiffs-appellee;
5. James Hood, III, in his official capacity as Attorney General of the State of Mississippi, defendant-appellant;
6. Douglas T. Miracle, Bridgette Williams Wiggins, Krissy C. Nobile; Mississippi Attorney General's Office, counsel for defendant-appellee;

7. F. Jerome Tapley, Hirlye R. (Ryan) Lutz; Cory Watson, PC, counsel for defendant-appellant;

8. Carolyn Glass Anderson, Patricia A. Bloodgood; Zimmerman Reed, PLLP, counsel for defendant-appellant;

9. John Wimberly Kitchens; Kitchens Law Firm, PA, counsel for defendant-appellant;

10. Sean F. Rommel; James (Jim) Clark Wyly; Wyly-Rommel, PLLC, counsel for defendant-appellant;

11. Jack Conway, Attorney General of Kentucky, Laura S. Crittenden, Todd Leatherman; Kentucky Office of the Attorney General, Amicus; Amicus Supported by: Mark Brnovich, Attorney General of Arizona; George Jepsen, Attorney General of Connecticut; Lisa Madigan, Attorney General of Illinois; Tom Miller, Attorney General of Iowa; Brian E. Frosh, Attorney General of Maryland; Joseph Foster, Attorney General of New Hampshire; Hector H. Balderas, Attorney General of New Mexico; Ellen F. Rosenblum, Attorney General of Oregon; Peter F. Kilmartin, Attorney General of Rhode Island; William H. Sorrell, Attorney General of Vermont; Bob Ferguson, Attorney General of Washington;

12. Paul D. Clement, Jeffrey M. Harris, Viet D. Dinh; Bancroft, PLLC, counsel for Amicus Digital Citizens Alliance, Taylor Hooton Foundation, Stop Child Predators, Ryan United;
13. C. Michael Ellingburg, Brooke M. Trusty; Daniel, Coker, Horton & Bell, counsel for Amicus Digital Citizens Alliance, Taylor Hooton Foundation, Stop Child Predators, Ryan United;
14. Jason R. Bush; Baker Donelson, Bearman, Caldwell & Berkowitz, PC, counsel for Amicus International AntiCounterfeiting Coalition;
15. Herbert W. Wilson, II; The Law Office of Herbert W. Wilson, II, PLLC, counsel for Amicus Electronic Frontier Foundation, Center for Democracy & Technology, Public Knowledge, Open Technology Institute, R Street Institute;
16. Corynne McSherry; Electronic Frontier Foundation, counsel for Amicus Electronic Frontier Foundation;
17. Michael J. Bentley; Bradley Arant Boult Cummings, LLP, counsel for Amicus Consumer Electronics Association, Computer & Communications Industry Association, Engine;
18. Robert S. Schwartz, Seth D. Greenstein; Constantine Cannon, LLP, counsel for Amicus Consumer Electronics Association, Computer & Communications Industry Association,

19. R. David Kaufman; Brunini, Grantham, Grower & Hewes, PLLC, counsel for Amicus Internet Commerce Coalition;

20. Andrew L. Deutsch; DLA Piper LLP, counsel for Amicus Internet Commerce Coalition; and

21. Judge Henry T. Wingate, United States District Court for the Southern District of Mississippi.

SO CERTIFIED, this the 22ND day of June, 2015.

*/s/ Krissy C. Nobile*
Krissy C. Nobile

## STATEMENT REGARDING ORAL ARGUMENT

Google is an Internet service provider that maintains and operates the world's most popular search engine. Given that it recently entered a Non-Prosecution Agreement with the Department of Justice—and forfeited $500 million in the process—it is no surprise the company would want to halt, through a wholesale federal injunction, any investigation into its conduct by any State Attorneys General. Yet, what is surprising is that the district court allowed Google to stop in its tracks a State investigation that barely has begun. What is more bizarre is that the district court enjoined the Attorney General of the State of Mississippi from filing *future* civil or criminal "charges" against Google. This all was accomplished in the name of federal law without the court ever invalidating, or even calling into question, state law.

The Attorney General has not found Google to be in violation of any state law. Nor has the Attorney General filed a lawsuit or commenced any prosecution against Google. The Attorney General only has initiated an investigation, through a duly-issued state administrative subpoena, to discover whether Google's conduct violates state law. In these circumstances, the district court's two-fold preliminary injunction falls out of step with settled federal law, and it deals a significant blow to fundamental principles of federalism and comity. This interlocutory appeal is a challenge to that granted preliminary injunction.

Because this appeal raises important issues of constitutional law and the precarious impact of distorted federal law on a sovereign State's ability to enforce its laws and investigate potentially unlawful conduct within its jurisdiction, and because this Court may wish to closely consider the cases that mark the path to reversal, the Attorney General requests oral argument under Fed. R. App. P. 34.

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## STATEMENT OF JURISDICTION

The district court found that it had original jurisdiction under 28 U.S.C. § 1331, and this Court has appellate jurisdiction over the district court's grant of a preliminary injunction. *See, e.g.*, 42 U.S.C. § 1292(a)(1); *Janvey v. Alguire*, 647 F.3d 585, 591-92 (5th Cir. 2011). A notice of appeal was timely filed on March 23, 2015, and an amended notice of appeal was timely filed on March 31, 2015, after the district court entered its memorandum opinion. ROA.23-24; 2074; 2109.

## STATEMENT OF THE ISSUES

1. Did the district court err by enjoining the Attorney General from filing an enforcement action on an administrative subpoena in state court pursuant to state law?

2. Is the district court's injunction prohibiting the Attorney General from filing future hypothetical civil or criminal "charges" under Mississippi law against Google in state court overly broad and in error when the injunction's legal conclusion would be a disputed material fact to be litigated if a state court lawsuit ever was brought?

## STATEMENT OF THE CASE

**Facts Relevant to Appellate Review**. Up until December 19, 2014, when Google preemptively filed suit, this case followed a typical investigatory path, especially when viewed in the context of the nature of the investigation, and the

sheer size of the entity being investigated. In chronological fashion, that path is as follows:

2011. In 2011, Google entered a Non-Prosecution Agreement with the Department of Justice after authorities alleged that Google was aiding overseas pharmacies in illegally marketing prescription drugs in the United States. ROA.157; 199-213; 1176-1198; 1401. Although Google already has paid $500 million to resolve such allegations, State Attorneys General have reason to believe that Google's services still are being used for unlawful activities. ROA.374-375; 472-531; 640-650; 927-1005; 1049-1096; 1176-1198; 1199-1200; 1240-1242; 1245-1246; 1421-1425.

2012. In late 2012, the Intellectual Property Committee of the National Association of Attorneys General ("NAAG") met to discuss efforts to address the online sale of stolen intellectual property and unauthorized prescription drugs. ROA.38.

2013. The following year, on February 13, 2013, Attorneys General from Hawaii, Virginia, and Mississippi wrote to search engines regarding a "concern[ ] about infringing activities[,]" including the "economic impact" and the "risk" to "consumers' health and safety" from "the sale of counterfeit products[.]" ROA.374. After this letter, Google entered into an Assurance of Voluntary

Compliance as part of a multi-state investigation by State Attorneys General pertaining to a Google product called Google Street View. ROA.1201-1239.

Thereafter, on April 1, 2013, Attorney General Hood transmitted a letter to Google regarding the issues set out in the February letter. ROA.376-378. The April letter stated that various Attorneys General "are interested in achieving a consensus on voluntary action that members of the search and ecommerce community can take to eliminate or significantly reduce infringing activities," but that "if voluntary actions will not suffice, we will take legal action to change behavior to protect consumers and the integrity of the economic commerce on the Internet." ROA.378. In April and May of 2013, respectively, Google responded to the February letter to search engines and to General Hood's April letter. ROA.379-385; 386-388.

On May 21, 2013, General Hood responded to Google, noting that Google's responses were "insufficient" and that, if Google did not provide responsive answers, he would "call on" "attorneys general to issue civil investigative demands[.]" ROA.389-391. Google's legal counsel responded to the Attorney General's "inquiry" on June 10, 2013. ROA.397-398.

General Hood followed suit on the same day, stating as follows:

> The State of Mississippi [ ] is *investigating* and *evaluating* Google's conduct related to its search algorithm, auto-complete feature, advertising policies, and any other related functions. The purpose of this *investigation* is to determine *whether there exist* any violations of Mississippi law. One of the many potential outcomes of the ongoing

> investigation *could be* civil or criminal litigation arising under state law.

ROA.397.

Shortly thereafter, on July 2, 2013, Attorneys General from Nebraska and Oklahoma wrote to Google regarding "Google's subsidiary, YouTube." ROA.1240-1242. On October 7, 2013, four Attorneys General, including General Hood, also wrote Google regarding YouTube and noted that they "hope[d] to work constructively with Google[.]" ROA.624-625. Then, on November 8, 2013, Google entered into yet another Assurance of Voluntary Compliance with thirty-seven states and the District of Columbia related to Google's posting of information to Apple's Safari Brower. ROA.1201-1239.

On November 27, 2013, General Hood transmitted a letter to Google responding to a letter Google's legal counsel had authored.[1] ROA.640-650. This letter outlined Google's conduct and why it "raises serious questions as to whether Google is engaged in unlawful conduct itself." ROA.640-650. That letter, in pertinent part, explained as follows: "Google would have us believe that it is a passive search engine . . . Google's admissions, however, to the United States[,] the admissions in its letter, and Google's own public proclamations belie such

[1] As part of the investigatory process, and that leading up to it, the Attorney General publically has acknowledged that he enlisted the assistance of various individuals and/or firms with knowledge and expertise concerning the issues at hand as well as those who were victims of potential violations of Mississippi's consumer protection laws. ROA.1446.

claims . . . [Google] is not being investigated or pursued for the conduct of others." ROA.640-650.

Google responded the same day:

> Google wishes to continue our substantive engagement with you and other Attorneys General on the important issues raised in your letter . . . We hope that we can find a mutually agreeable time to meet in the near future . . . We welcome hearing about instances in which our services are being misused . . .

ROA.651.

After this letter, on December 10, 2013, twenty-three Attorneys General again wrote Google, advising that "a growing number of state Attorneys General have expressed concerns regarding troubling and harmful problems posed by several of Google's products." ROA.722-723.

2014. On January 23, 2014, Google authored a letter to General Hood, with nine other Attorneys General copied, concerning a recent meeting between Google and a number of Attorneys General. ROA.744-745. In that letter, Google expressed that it "look[ed] forward to continuing th[e] dialogue and making progress to address the issues raised[.]" ROA.744. Google, in addition, noted that the "meeting was constructive" and that the company was "committed to continuously refining [its] enforcement efforts and [the company] welcome[d] [the] continuing thoughts to help [it] further improve [its] products and services." ROA.745. Five Attorneys General responded to this letter. ROA.746-748; 749-757.

On October 21, 2014, after this dialogue between Google and various Attorneys General, General Hood served Google with the administrative subpoena that forms the basis of this lawsuit. ROA.1097-1175.

**Relevant Procedural History**. Google was served with the subpoena pursuant to the Mississippi Consumer Protection Act ("MCPA"), Miss. Code § 75-24-27, on October 21, 2014. ROA.1097-1175. It is undisputed that the issuance of the subpoena was a valid exercise of the Attorney General's authority under state law. MISS. CODE ANN. §§ 75-24-27; 75-24-9; 75-24-5. The stated basis of the subpoena was information that provided the Attorney General "reasonable grounds to believe that Google has used trade practices that are unfair, deceptive, and misleading" in violation of state law. ROA.1097-1098.

Google's response to the subpoena was due on November 20, 2014, but, by agreement of the parties, that deadline was extended to January 5, 2015. ROA.53. Instead of again requesting time to respond, or properly challenging the subpoena in state court, Google filed a federal lawsuit on December 19, 2014. ROA.30-63. The district court thereafter granted Google a preliminary injunction. ROA.2025-2028; 2084-2108.

## SUMMARY OF THE ARGUMENT

This is not your run-of-the-mill preliminary injunction. Two consequences alone prove that. First, the injunction prohibits the chief law enforcement officer of

a sovereign state from fulfilling a lawfully charged duty to investigate potentially unlawful conduct and enforce state law. Second, a company charged with complying with state law may not have to. Needless to say, this is a perverse exercise of federal jurisdiction.

There is no lawsuit pending against Google; there is only a non-self-executing investigative subpoena. Mississippi state law, like many states, allows for the issuance and enforcement of administrative subpoenas under its consumer protection statutes. The statutory framework undisputedly was followed here. Under that statute, the Attorney General can *issue* a subpoena *requesting* information. Importantly, though, only a state *court* can compel compliance, and the state court only can do so after notice to the recipient of the subpoena and a hearing.

Google preferred not to respond in full to the subpoena issued to it, and it preferred not to honor state law or avail itself to the channels set forth under state law to quash or narrow the subpoena. It instead attempted an end-run to federal court to get a preliminary injunction. Not only did the district court acquiesce, but the court issued a "blunderbuss" injunction against *future action* by the Attorney General.

Administrative subpoenas are common investigatory tools for agencies in Mississippi and many other states, and many of the statutory frameworks are

similar to the ones set forth in MCPA. If the district court's opinion is allowed to stand, it no doubt will serve to mute agency investigations across the State, and across the nation. In the future, parties will not respond to an administrative subpoena, cooperate in any state investigation, or even challenge the subpoena in state court, as required, when the state procedures so easily may be hijacked. While the injunction issued here is directed at Mississippi's Attorney General, the effect of the injunction does not end with this Officer, or the State of Mississippi.

A look at the injunction paints the story of why. The sweeping injunction enjoins the Attorney General in two respects. ROA.2025-2028. First, the granted injunction prohibits the Attorney General from seeking to "enforce[e]" the duly-issued state administrative subpoena. Second, the injunction broadly and confusingly prohibits the Attorney General from bringing "charges" against Google "under Mississippi law for making accessible third-party content to Internet users," even though the State's subpoena was not investigating third-party content and the injunction's legal conclusion often turns on a question of fact. Neither prong of the injunction holds up, either procedurally or substantively.

**Injunction One**. By statute, the subpoena issued to Google is not self-executing. At worst, then, if Google simply refused to answer the subpoena, the Attorney General would have to initiate an enforcement proceeding in state court. On these facts, to reach the conclusion that irreparable harm will be caused simply

by seeking to enforce the subpoena, the lower court had to postulate, without basis, that the state court would act unconstitutionally and allow Google's federal rights to be violated. This is an untenable suggestion for irreparable harm, and it incorrectly deviates from the notions of "our federalism" that date back centuries and fortify the Court's abstention decision in *Younger v. Harris*, 401 U.S. 37 (1971).

Also unavailing are Google's likelihood of success arguments. A lawsuit has not been filed against Google, and none of the claims urged preclude an investigation, or serve to forbid the Attorney General from asking the state court to enforce the subpoena. This alone is defeating of injunction one, but a more detailed analysis of the asserted claims shows why.

The parties agree that the Communications Decency Act ("CDA") provides Google with some level of immunity from suit for certain actions. Google is not satisfied with the immunity that Congress has provided, though, so the company has demanded unfettered immunity, including immunity from investigation. Simply put, the CDA does not offer that—*even to Google*.

Neither does a potential First Amendment defense. The First Amendment does not categorically insulate a company from an investigation into unlawful activity, and Google should not be able to use the possibility of an eventual First Amendment defense, on what is now a factually undeveloped record, to

preemptively shut down the State's investigation. The same is true for Google's cursory preemption arguments made under the Copyright Act and the Food, Drug, and Cosmetic Act ("FDCA"). These federal laws do not preempt a State investigation, and, at this investigatory stage, Google did not (because it cannot) credibly suggest that the information sought by the subpoena could support *only* preempted claims, rather than any number of *non*-preempted state law actions.

The Fourth Amendment also cannot serve as a basis to shut down the State's investigation *ab initio*. Even should the federal court place itself as the "first line" of review for *state* administrative subpoenas, the Attorney General's investigatory subpoena meets the "minimal" and "strictly limited" review conducted by federal courts of federal agency subpoenas.

When it comes to comparison of harms, the district court's inquiry is curious. The court's analysis turned abruptly on the fact that the State purportedly will not be harmed because it can investigate "other matters." ROA.2106-2107. ("The Attorney General will not be able to move on matters at issue herein, namely, the enforcement of the subpoena and the filing of charges against Google, but he still may conduct an investigation and file an action regarding *other matters* that are within his jurisdiction."). Such a rationale does nothing to establish that an injunction should issue to Google, and it amounts only to an indecorous retreat

from core principles of comity, as it judicially dictates who a sovereign State may investigate under its own constitutionally-sound state laws.

On this point, the public interest inquiry is not close. It cannot legitimately be disputed that the State has a significant interest in enforcing its enacted laws. This especially is true when those laws, such as the MCPA, are designed to protect *the public*. Few things, in fact, can tip the scales more sharply against the type of injunction issued by the district court.

**Injunction Two.** Federal Rule 65 "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders[.]" *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). That test is simple, but it is one in which the second-prong of the injunction fails. The injunction's dictates are specious, and the relief leaves the Attorney General open to a contempt proceeding should he *ever* file a suit against Google—*and lose*.

Google has urged that the injunction is narrow; that it prohibits only that which is prohibited by federal law. Google's assertion is disingenuous. Neither the CDA nor any other law at issue here provides across-the-board immunity. The injunction, therefore, must presuppose both that federal law disallows the gathering of facts *and* that whether conduct is immunized or protected never can be a question of fact. This is belied, however, by the fact that courts have denied

motions to dismiss based on immunity, including Google's own motions, due to fact questions.

Similarly, there is no irreparable harm or likelihood of success. To reach either argument, the Court would have to engage in pure academic guesswork as to what "charge" would be filed, including if one ever would be filed at all. From this, it is evident that many of Google's so-called claims amount only to premature defenses. What's more is that the injunction's prohibiting of future "charges" presumes that the State's investigation is complete. Yet this is the action that the first prong of the injunction disallows.

The balance of harms and public interest inquiry tips sharply in favor of the Attorney General. On one side of the ledger, the Attorney General has sought only information as to whether Google's actions violate consumer protection laws. On the other side, the federal court expressly has permitted potentially unlawful activity to go undetected by enjoining the Attorney General from both investigating and filing a future lawsuit against Google, *if* ever warranted. Such an injunction is an unprecedented and drastic measure, and, while it certainly benefits Google's interests, it does not serve the interests of the public.

## ARGUMENT

The preliminary injunction four-factor test is familiar. *See Affiliated Prof'l Home Health Care v. Shalala*, 164 F.3d 282, 285 (5th Cir. 1999). When that test is

examined in the context of the district court's injunction, the errors are manifest and dispositive.

## I. Standard of Review Governing this Preliminary Injunction.

The standard of review to grant or deny a preliminary injunction is abuse of discretion. "This discretion, however, is not unbridled, and a preliminary injunction must be the product of reasoned application of the four factors held to be necessary prerequisites." *Enterprise International, Inc. v. Corporacion Estatal Petrolera Equatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) (citation omitted). "[I]f the movant does not succeed in carrying its burden on any one of the four prerequisites, a preliminary injunction . . . will be vacated on appeal." *Id.*

The legal principles upon which any preliminary injunction decision is grounded are reviewed *de novo. Woman's Med. Ctr v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001). This includes questions of subject matter jurisdiction, and "whether the elements for *Younger* abstention are present." *Borden v. Allstate Insurance Co.*, 589 F.3d 168, 170 (5th Cir. 2009); *Gibson v. Orleans Parish*, No. 13-30944, 2014 WL 1066987, at *1 (5th Cir. Mar. 20, 2014).

## II. The District Court Erred in Enjoining the Attorney General from Seeking to Enforce the Subpoena.

### A. The Attorney General's Authority to Investigate.

The Attorney General, like all Attorneys General, is the chief law enforcement officer in the State. Married to this position is the paramount duty to

investigate potential violations of state laws, including violations of the MCPA. In carrying out the duty to investigate, administrative subpoenas, also referred to as civil investigative demands ("CIDs"), are a valuable and necessary tool. And they certainly are not unique to the State of Mississippi.[2]

The subpoena here was issued pursuant to Mississippi Code § 75-24-27. Such subpoenas are not self-executing. The Attorney General cannot unilaterally compel compliance; he only can initiate an enforcement proceeding in state court. At that point, the subject of the subpoena is provided notice, a hearing, and an opportunity to present to the state court any objections to the subpoena. *Id.* These state-court procedures are the ones from which Google has recoiled and, worse, the lower court has enjoined.

### B. Google Failed to Demonstrate Irreparable Harm.

Google has yet to urge any legitimate argument as to how litigation of its defenses in state court could amount to irreparable harm. And the district court failed to even consider the same consequences. Instead, the district court relied on the First Amendment alone to find irreparable harm. ROA.2105-1206.

While the Attorney General does not dispute that the loss of First Amendment rights can play an important role in the examination, Google's efforts to hide behind the First Amendment do not hold up. Google never once contends

[2] ROA.1964-1978.

that producing the documents requested in the subpoena would run afoul of the First Amendment, so as to cause irreparable harm. Google, in fact, could not argue this. The company "voluntarily" provided some information in response to the subpoena (*i.e.*, partially complied), it compiles many similar documents for its own Transparency Report, and it publically provided documents to the court in support of its preliminary injunction motion. ROA.95; 1406; 1417. Google also never suggests how asking the state court to quash the subpoena could cause irreparable harm, and Google never contends that the provision of the law on which the subpoena was issued limits speech.

Tellingly, Google concedes that the subpoena could be narrowed and that the Attorney General can seek facts as to whether federal law immunizes Google's conduct. ROA.1543. ("Should the Court enjoin enforcement of the Subpoena, the Attorney General is of course free to develop a narrow subpoena that does not focus on activity immunized under the CDA."); ROA.54. ("Google asked that the Subpoena be withdrawn *or at least limited* to activity not immunized by Section 230 of the CDA."); ROA.95. ("A subpoena limited to seeking the facts necessary to determine whether immunity exists would be a different matter."). At issue here, therefore, is the purported *scope* of the subpoena, and that Google thinks it may have a First Amendment defense *if* a lawsuit ever is filed.

At this investigatory juncture, the Attorney General cannot compel Google to produce documents or force Google to change its business operations. In an effort to defeat *Younger*, in fact, Google avowed that it thought the subpoena "neither declared nor enforced any liability." ROA.1534. Google's irreparable harm argument thus rings hollow. The company, at bottom, does not want to litigate in state court in Mississippi, and it does not want to respond to the subpoena because it purportedly "would have to produce millions of documents." ROA.91. Neither of these contentions establishes irreparable harm, and the latter argument only is one for narrowing the subpoena, not enjoining the investigation.[3]

More importantly, in finding that irreparable harm would result from the Attorney General asking the state court to enforce the subpoena, the district court had to deduce, with no basis, that the state court would act unconstitutionally. This presumption of potential wrong doing on the part of the state court is a direct affront to the Supreme Court's repeated affirmation "of the constitutional obligation of the state courts to uphold federal law, and [our] expression of confidence in their ability to do so." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997).

[3] A litany of cases support this proposition: *American Radio v. Mobile S.S. Ass'n*, 483 F.2d 1, 5 (1973) (danger only would arise "if we equate danger with the litigation of one's claim in the Alabama state courts"); *O'Keefe v. Chisolm*, 769 F.3d 936, 939 (7th Cir. 2014); *Canal Auth.*, 489 F.2d at 575; *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 474 (5th Cir. 1985) (the "time and energy necessarily expended" without an injunction "are not enough").

In the main, Google's preliminary injunction motion is a paradigmatic example of both forum shopping and procedural fencing. Google's goal is to win a "race to judgment" by having the federal court ignore the principles of federalism and comity. Even in the absence of abstention being appropriate from a doctrinal standpoint, it is perverse to short circuit, through a wholesale federal injunction, state court procedures and express doubts in the confidence of the state courts to uphold federal law. There are valid and constitutionally unchallenged channels in state court for narrowing or quashing the subpoena. From this, Google has an adequate remedy at law—Google just does not like the forum in which it is available.

### C. Google Failed to Demonstrate a Likelihood of Success.

The district court's "all or nothing" injunction misses the mark. Google clutters the record with anticipatory defenses and references to the future lawsuit it thinks the Attorney General might file. But injunction one has prohibited the Attorney General from *asking* a state court to enforce *an administrative subpoena*.

Precisely none of Google's claims serve to prohibit that. Indeed, even when Google's "claims," such as the CDA, properly are asserted as defenses in the context of *a lawsuit*, the litigated issues require a "fact-intensive" inquiry that often cannot be resolved until after discovery. An administrative subpoena is one giant step removed from that.

Significantly, too, by transforming its defenses into claims, Google has brought the "fight" to the doorstep of the court. In doing so, the company will be required to factually (and legally) prove each one of its claims, including its entitlement to immunity. There is thus no legal basis for Google to say that its claims prohibit the Attorney General from investigating those same claims, asking a state court to enforce the subpoena, or prohibit Google from altogether producing documents.

An examination of Google's actions confirms the host of errors in the granted injunction. Google's so-called causes of action break down into four categories: (i) immunity under the CDA; (ii) the First Amendment; (iii) federal preemption; and (iv) the Fourth Amendment. Each is discussed in turn.

***i. The Communications Decency Act.***

Because there has been no lawsuit filed, the question to be asked is not the purely academic one of whether Google may be entitled to a CDA defense if a cause of action is filed in the future. The question is whether the CDA outright shields Google from an investigation and prohibits the Attorney General from even asking a state court to enforce an administrative subpoena. The answer to *this* question is undisputed: *it does not.*

Even if this case was one more step down the litigation line, the CDA does not prohibit the filing of a lawsuit against Google, as many have been filed before.

Many also have proceeded to discovery. In fact, Google has before asserted its CDA immunity defense at the motion to dismiss stage, and Google has before lost on that front. This includes losing on claims urged pursuant to state law. *See, e.g.*, *CYBERsitter v. Google*, 905 F. Supp. 2d 1080, 1086 (C.D. Cal. 2012); *Perfect 10 v. Google*, 2008 WL 4217837, at *8 (C.D. Cal. Jul. 16, 2008).

For this reason, Google's retreat from Rule 12(b)(6) in favor of seeking refuge in Rules 8 and 65 is improper. Those latter rules, neither alone nor in conjunction, provide an escape hatch to prevent an investigation into the company's actions. Indeed, Rules 65 and 12(b)(6) are, to some extent, opposite sides of the same coin. If you lose at Rule 12(b)(6) because of immunity questions of fact in the context *of a lawsuit*, you certainly should not win a blanket injunction as a matter of law in the context *of an initial investigation*.

In attempting to override this simple fact, Google superficially brands CDA immunity as a "one size fits all" legal weapon. Such a myopic reading of the law, however, quickly may be discarded. Immunity under the CDA is much like other types of immunity, including qualified immunity. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-55 (4th Cir. 2009) ("Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process. As we have often explained in the qualified immunity context, immunity is an immunity from suit . . . ."). It is true that courts

have interpreted § 230 of the CDA to protect services providers, including Google, in certain circumstances. Those circumstances, however, are when the CDA is asserted as a defense to a lawsuit. Even then, those circumstances are fact specific and dependent on the nature of the claim asserted, as is the case with all immunity.

The CDA's provisions help illustrate the problems with Google's argument. The CDA reads, in part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute goes on to define "information content provider" as "any . . . entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). By its very terms, however, the statute preserves a number of potential claims. *See* 47 U.S.C. § 230(e). This includes claims brought under state law, *see* 47 U.S.C. § 230(e)(3), and a number of distinct immunity exceptions.

***First***, the CDA provides that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property." § 230(e)(2). This provision has been treated as a carve-out from CDA immunity for both federal and state law intellectual property claims. *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009); *Universal Comm. Sys. C. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Chicago Lawyers' Comm. For Civil Rights Under*

*Law, Inc.*, 519 F.3d 666 (7th Cir. 2008). The Attorney General's subpoena requested information related to exception number one. ROA.1287-1290; 1097-1175.

***Second***, the CDA does not extend immunity to a defendant for its own acts of fraud or misconduct. *See, e.g., CYBERsitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086 (C.D. Cal. 2012); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 (N.D. Cal. 2006). The subpoena additionally requested information related to exception number two. ROA.1287-1290; 1097-1175.

***Third***, the CDA does not immunize Google for its own participation in developing illegal conduct. *See* § 230(f)(3); *Fair Housing Council v. Roommates.com*, 521 F.3d 1157, 1162-68 (9th Cir. 2008); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1191 (10th Cir. 2009). The subpoena also requested information related to exception number three. ROA.1287-1290; 1097-1175.

In general, on these latter exceptions, Google is right in that § 230 of the CDA immunizes it from its passive display as a "publisher" of content created by third parties. *Doe v. MySpace*, 528 F.3d 413, 418 (5th Cir. 2008) (noting that § 230(c)(1) bars claims against web-based service providers "stemming from their publication of information created by third parties"). But that is where it ends. Section 230's protections apply only if the interactive computer service is not *itself*

an information content provider. *Roommates,* 521 F.3d at 1162-68; *Accusearch, Inc*., 570 F.3d at 1191.

Without hesitation, courts have reasoned that the terms "interactive computer service provider" and "information content provider" are not mutually exclusive. That is, "[i]t is not inconsistent" for a particular entity "to be an interactive service provider and also an information content provider." *Anthony*, 421 F. Supp. 2d at 1263. Where a search engine is "much more than a passive transmitter of information by others," and instead "becomes the developer, at least in part, of that information," § 230 affords no protection. *Roommates*, 521 F.3d at 1166; *Accusearch, Inc*., 570 F.3d 1187, 1191 (10th Cir. 2009); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 410 (6th Cir. 2014).

Despite these marked exceptions to CDA immunity, the lower court issued an unrelenting injunction that suspends *Younger* and warps federal law, so as to insulate the company from any state investigation. The injunction, in this regard, judicially generates a level of immunity not offered by Congress. The inunction also is premised on circular logic. The point of the (or any) investigation was to unearth the facts necessary to determine whether the CDA's grant of immunity applies in the first instance. More to the point, the Attorney General's investigation was designed to determine the precise nature of Google's role and whether the company's conduct crosses the line between immunized and actionable.

Google is not blind to this, as the company has been investigated before—most recently, by the Department of Justice. If that investigation had been suppressed prematurely, there would not have been a $500 million dollar settlement reached. A settlement and an investigation that, much like the Attorney General's, sought to vindicate public interest concerns. Under the lower court's rationale, that investigation and settlement should not have happened.

The granted injunction signals that Attorneys General (and others) judicially will be forced to accept, at face value, Google's own version of the *untested* facts, including whether the company's conduct *is* violative of state law and *not* immunized by federal law. The injunction, in this regard, incorrectly ratifies Google's "trust us" litigation tactic, a ploy courts rightfully have refused to endorse even in the lawsuit context. *See Perfect 10 v. Google, Inc.*, 2008 WL 4217837, at *8 (C.D. Cal. Jul. 16, 2008) (rejecting the argument that it was "common knowledge that Google is not a content provider" and noting that the "question of whether any of Google's conduct disqualifies it for immunity under the CDA will undoubtedly be *fact-intensive*"); *see also Hare v. Richie*, No. ELH-11-3488, 2012 WL 3773116, at *1, *19 (D. Md. Aug. 29, 2012) (allowing "the creation of factual record" so that the court could determine whether the website "encourages development" of offensive content "submitted by third parties . . . so as to lose the protection of § 230(c)(1) for user-submitted content by participating in the

content's development"); *Demetraides v. Yelp*, 175 Cal. Rptr. 3d 131, 145 (Cal. App. 2014) ("Nowhere does plaintiff seek to enjoin or hold Yelp liable for the statements of third parties . . . Rather, plaintiff seeks to hold Yelp liable for its own statements regarding the accuracy of its filter.").

In many cases, including cases where Google ended up on the other side of a lawsuit, dismissal was not proper prior to federal discovery. Under the district court's ruling though, the Attorney General cannot even investigate Google's conduct, let alone formulate a claim or get to discovery. And this is despite the fact that the Attorney General explicitly has informed Google that "it is *not* being investigated or pursued for the conduct of others." ROA.647.[4]

In short, the injunction is a perilous game changer. It judicially transforms what has been likened, even by Google, to qualified immunity from suit into unqualified immunity from state law (and state court).

***ii. The First Amendment.***

The Attorney General fully accepts that Google's advertising practices can implicate First Amendment considerations. Google's and the district court's

[4] Oddly, the district court relied on a letter from over forty Attorneys General to Congress regarding the scope of the CDA to find a likelihood of success. ROA.2101. That letter, however, concerns "prostitution" and "crimes against children." ROA.609-613.

The district court reasoned that the letter revealed that the Attorney General knows the scope of the CDA. ROA.2101. In this regard, the district court was right. The Attorney General *does* understand the CDA. As he stated at the NAAG's summer meeting, he and many other Attorneys General simply think that Google is "stepping over the line out of [the CDA's] protections." ROA.405.

expansive reading of the First Amendment, however, impairs—and, in fact, obstructs—any authorized investigation when the conduct being investigated encompasses the use of an internet service. Such a scopic interpretation of federal law goes too far.

Less than five years ago, the First Amendment did not preclude federal and state authorities from investigating online drug sales by entities that used Google's services. Nor did it stop Google from entering into a Non-Prosecution Agreement. ROA.1176-1192. Moreover, that same investigation raised other serious legal and factual questions, such as whether Google helped others circumvent the law. These types of questions are the ones on which the Attorney General's investigation seeks answers.

In its complaint, Google neither challenged the Attorney General's authority to issue the subpoena nor the regulation under which it was issued. Google never claims that the MCPA is facially unconstitutional, and the company identifies no case in which a court has found that MCPA enforcement violated constitutional rights.[5] To the contrary, Google merely asserts that the "Attorney General's Inquiry against Google constitutes the exercise of prosecutorial and/or civil regulatory authority under color of state law." ROA.59.

[5] The MCPA has been applied in several instances. ROA.1322.

This argument proves too much. This Circuit, as well as the Supreme Court, repeatedly has stressed the importance of a "sufficiently specific record," "[p]articularized facts," and a full factual context when assessing the constitutionality of a regulation of speech. *See, e.g., Turner Broad Sys. v. FCC*, 512 U.S. 622, 668 (1994); *Justice v. Hosemann*, 771 F.3d 285, 292-94 (5th Cir. 2014); *In re Cao*, 619 F.3d 410, 434 (5th Cir. 2010); *Bartnicki v. Vopper*, 532 U.S. 514, 524 (2001); *City of Los Angeles v. Preferred Communications, Inc*., 476 U.S. 488, 495-96 (1986). "[I]n cases raising First Amendment issues," the Court has recognized the need "to make an independent examination of the entire record." *Bose Corp. v. Consumeres Union of U.S., Inc*., 466 U.S. 485, 499 (1984).

The grant of Google's preliminary injunction has prevented the State from amassing the factual record that would be necessary to evaluate Google's First Amendment claim, including whether any of the possible exceptions to it apply. Indeed, even Google appears to acknowledge that it would not altogether be shielded by the First Amendment if it were participating in unlawful or criminal activity. And Google concedes that it complies with a number of subpoenas and even search warrants each year. ROA.1406; 1417.

In the same vein, Google readily acknowledges that the Attorney General properly may inquire on the issue of federal immunity, including through the issuance of a subpoena. For instance, Google acknowledges, albeit

paternalistically, as follows: "A subpoena limited to seeking the facts necessary to determine whether immunity exists would be a different matter." ROA.95. Google, of course, wants to be the sole arbiter of those "necessary" facts. But, even with this, it is clear that even Google accepts that the First Amendment does not remotely insulate the company from complying with an investigation into potential illegal activities—including the State of Mississippi's.

Google's so-called investigatory retaliation claim also cannot get it a federal injunction at the stage in which the State's investigation is in its infancy. Both Google and the district court turned to *Izen v. Catalina*, 398 F.3d 363, 367 (5th Cir. 2005) for the analysis of the retaliatory investigation claim. ROA.101; 1550; 2102. *Izen*'s principles, however, do not fit this mold.

The retaliation challenge in *Izen* was made after a criminal prosecution, not before the investigation could begin. *Id.* On the First Amendment claim, this Circuit held that, in the "prosecution context," plaintiffs "must establish each of the common law malicious prosecution elements in addition to those three derived from the First Amendment . . . One of these standards is an absence of probable cause to prosecute."[6] *Id.*

[6] Probable cause is not required for administrative subpoenas, as discussed *infra*. Also, another element of malicious prosecution is *termination of the state proceedings* in the plaintiff's favor. *Pardue v. Jackson Cnty., Miss.*, No. 1:14-CV-290-KS-MTP, 2015 WL 1867145 (S.D. Miss. Apr. 23, 2015).

The expressed reason for why the elements of malicious prosecution must be demonstrated was that "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause . . ." *Id.* at 368 (citing *Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992); *Allen v. McClelland*, No. H–13–1416, 2015 WL 1968908, at *9 (S.D. Tex. April 28, 2015) ("[T]he First Amendment does not protect individuals from arrests supported by probable cause, even if the motivation is retaliation. Where there is grounds to charge criminal conduct, the objectives of law enforcement take primacy over the citizen's right to avoid retaliation.").[7]

In relying on *Izen* not only to declare its rights but also to halt *an investigation* before it even may begin, Google has capsized the case's analysis and perverted its teachings. The only way the Attorney General truly and fairly even can *attempt* to defend Google's retaliatory investigation claim would be for the Attorney General to preemptively reveal law enforcement investigatory theories and/or files—at the inception of the (halted) investigation and on a completely undeveloped factual record at that.[8] With due respect, this is a radical proposition—even for Google.

[7] *Younger*, 401 U.S. at 51 ("Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action.").

[8] Unlike in *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979), where the court evaluated *Younger*'s bad faith exception, there has been no prosecution initiated by the Attorney General against Google. *See id.* Yet, the Attorney General has demonstrated that the subpoena

What's more is that many courts have questioned whether an investigation even gives rise to a First Amendment action. The Supreme Court in *Hartman v. Moore*, 547 U.S. 250 (2006) mentioned—but pointedly did not resolve—the issue. 547 U.S. at 262 n.9 ("No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort . . ."). After *Hartman*, courts have determined that a retaliatory investigation does not "form the basis of a constitutional claim." *See, e.g., Trueman v. United States*, No. 7:12-CV-73-F, 2015 WL 1456134, at *13 (E.D.N.C. Mar. 30, 2015).[9]

The query before this Court not only is whether Google prematurely can seek to declare its rights, it is whether the injunction was proper. Notably, out of all of the First Amendment cases cited by Google, even those with drastic and inapposite factual scenarios, not in a single one was an injunction halting a state investigation at its inception granted. ROA.101-103; 1548-1549. That alone underscores the radical nature of the district court's decision.

Google's heavy reliance on *Lacey v. Maricopa County*, 693 F.3d 896, 910-17, 922 (9th Cir. 2002) is instructive. While Google reduces *Lacey* to a claim

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was likely to produce information directly relevant to whether Google is in violation of the MCPA.

[9] *See, e.g., Rehberg v. Paulk*, 611 F.3d 828, 850 n. 24 (11th Cir. 2010); *Yazid–Mazin v. McCormick*, 2013 WL 5758716, at *4 n. 5 (D.N.J. Oct. 24, 2013); *Roark v. United States*, 2013 WL 1071778, at *5 (D. Or. Mar. 12, 2013); *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999) (noting in dicta that even had the County Attorney's Office initiated an investigation, this would not be actionable).

about retaliatory investigation, that is not at all what *Lacey* was about. In *Lacey*, unlawful arrests were made, contempt motions were filed, a newspaper was asked to reveal its sources, and a criminal prosecution was initiated and dismissed. *Id*. In addition, the Sheriff had "pressured county attorneys in Maricopa and Pinal counties to prosecute, *even after attorneys in both counties concluded there was no case*." *Id.* The county also had issued several grand jury subpoenas to a newspaper, but the claim was brought after a state court had "declared" the subpoenas "*invalid*." *Id.* at 910-912. *Lacey* does not offer Google a lifeline to an injunction, and neither do the remaining cited cases.[10]

Unless the First Amendment is an absolute bar to any government investigation into conduct in any way related to Google's search and advertising functions—which no court ever has suggested and cannot be the law—the Attorney General has offended no constitutional right by asking for some information related to those functions that may violate state consumer protection laws.

[10] *See, e.g., Pendleton v. St. Louis Cnty*., 178 F.3d 1007, 1011 (8th Cir. 1999) (Appeal was at the Rule 12(b)(6) stage and allegations were that defendants "fabricated a criminal investigation in furtherance of a conspiracy." The claim survived a motion to dismiss, but no injunction was granted.); *Little v. City of N. Miami*, 805 F.2d 962, 968 (11th Cir. 1986) (Appeal was at the Rule 12(b)(6) stage and allegations were that the defendant "adopted . . . official resolution publically censuring appellant in retaliation for appellant's representation of an adverse party in state litigation . . ." The claim survived a motion to dismiss, but no injunction was granted); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (No injunction granted halting the investigation where "HUD officials [among other things] carried out an investigation that lasted more than eight months" when the law set a "presumptive 100–day time limit").

***iii. Federal Preemption.***

Google's preemption defenses are brought under the Copyright Act and the FDCA. All parties agree that federal law, in certain circumstances, can preempt state law, but no cause of action has been brought at this juncture. In this regard, saying that Google put the proverbial cart before the horse would be to put it mildly. To reach Google's preemption conclusion, the Court must either: (a) determine that federal law altogether preempts any state *investigation*, or (b) must theorize what the investigation will reveal, whether a suit will be filed, what the suit will allege, and whether Google will be able to establish a preemption defense. No court ever has suggested the former in these circumstances, and the latter forces this Court to work in hypotheticals.

The latter also compels the Attorney General to manufacture the "claim" he *might* file, and then also demonstrate how that suppositious claim is *not* preempted. While this might be intellectually seductive, it transmutes ordinary preemption defenses into forced offensive *pre*-litigation. The lower court's opinion especially is illustrative of why such an analysis is inapt.

The district court, for instance, reasoned that "[w]ith very limited exceptions, actions brought for violations of the FDCA are exclusively within the purview of the federal government." ROA.2104. The court also peculiarly explained that it is "well-established that state attorneys lack the authority to

enforce the Copyright Act." ROA.2103. From this reasoning, the district court leaped to the impossible conclusion that such laws "preempt[ ] much of the Attorney General's investigation." ROA.2104.

Such a rationale presupposes both that the Attorney General is trying to enforce the Copyright Act, and that the Attorney General has or even will bring an "action[ ]" for "violations of the FDCA." Yet, the Attorney General is not even close to that point, as he only has requested information. The decision also recognizes the lack of complete preemption while, at the same time, incorrectly equating causes of "actions" to an "investigation," something courts have refused to do. In fact, on this point, Google's best but unavailing authority is instructive.

In *Major League Baseball v. Crist*, 331 F.3d 1179 (11th Cir. 2003), the Eleventh Circuit prohibited attorney general administrative subpoenas because the "business of baseball" is exempt from **all** state and federal antitrust laws. *Id.* at 1183-86. Even with the across-the-board exemption at issue in *Crist*, the court expressly declined to halt the investigation on preemption grounds. *Id.* at 1186. Google's own case citations thus are self-defeating of its preemption claims.

A related problem for Google is that it cannot demonstrate that the same categorical exemption that existed in *Crist* is at play in this litigation. For instance, under the "extra element" test applied by this Circuit, a right under state law is not "equivalent" to any of the rights in the scope of federal copyright law, and there is

no preemption if "one or more qualitatively different elements are required to constitute the state-created cause of action." *Computer Mgmt. Asst. Co. v. Robert F. DeCastro, Inc*., 220 F.3d 396, 404 (5th Cir. 2000). As noted in the lower court, the elements of certain potential state law claims do not overlap with federal copyright law. ROA.1293-1294. The same is true for arguments related to the FDCA.[11] ROA.1296.

Ultimately, even under Google's flawed preemption analysis, the company did not (because it cannot) credibly suggest that the information sought by the subpoena could support *only* preempted claims, rather than any number of *non*-preempted claims. A wholesale injunction thus was in error.

***iv. The Fourth Amendment.***

Just as state courts resolve disputes regarding state administrative subpoenas, federal courts routinely hear disputes regarding subpoenas issued by federal agencies. Even should the federal court place itself as the first line of review for federal *and* state subpoenas, the Attorney General's subpoena meets the "minimal" and "strictly limited" review conducted by federal courts of federal agency subpoenas. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209-10

[11] The safe harbor provision in the Digital Millennium Copyright Act ("DMCA") also does not assure blanket immunity. And Google recognizes that the subpoena is not completely preempted. ROA.61. ("The Attorney General's Inquiry, ***in so far as*** it pertains to ***possible*** copyright infringement or the importation of prescription drugs is preempted[.]").

(1946);[12] *Sandsend Fin. Consultants, Ltd. v. FHLBB*, 878 F.2d 875, 879 (5th Cir. 1989); *United States v. Chevron*, 186 F.3d 644, 647 (5th Cir. 1999).

For administrative subpoenas, the Supreme Court has refused to require that an agency have probable cause to justify the issuance of such. *United States v. Powell*, 379 U.S. 48, 57–58 (1964). Administrative agencies have the "power of inquisition . . . analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co*., 338 U.S. 632, 642–43 (1950); *United States v. Zadeh*, No. 4:14-CV-106-O, 2015 WL 418098, at *2 (N.D. Tex. Jan. 31, 2015).

Under this limited review, courts ask two questions: (1) "whether the investigation is for a proper statutory purpose and (2) whether the documents the agency seeks are relevant to the investigation."[13] *One*: the Attorney General's statutory grounds for the issuing the subpoena are unchallenged. *Two*: the documents sought certainly are relevant to the investigation as to whether state law has been violated.[14]

[12] As stated in *Oklahoma Press*, "[w]hat [Google] seek[s] is not to prevent an unlawful search and seizure. It is rather a total immunity" from the law.

[13] *Sandsend*, 877 F.2d at 879; *See v. City of Seattle*, 387 U.S. 541, 544 (1967).

[14] For "purposes of an administrative subpoena, the notion of relevancy is a broad one . . . So long as the material requested touches a matter under investigation, an administrative subpoena will survive a [relevancy] challenge." *Sandsend*, 878 F.2d at 882.

While Google (again) relies on the Eleventh Circuit's *Crist* case, that case (again) reveals precisely why the Fourth Amendment is *not* triggered in this instance. *Crist*'s holding is logical: "investigations premised **solely** upon **legal** activity are the very type of 'fishing expeditions' that run afoul of the Fourth Amendment." *Crist*, 331 F.3d at 1187 (emphasis supplied). The Attorney General there had issued CIDs "based solely upon the Attorney General's authority to investigate antitrust violations." *Id*. at 1180 n.5. However, the conduct being investigated was per se legal—as the "business of baseball" enjoys categorical exemption from antitrust laws.

No matter the outcome of the investigation in *Crist*, an antitrust claim could not be filed. In effect, then, there was no reason for the Attorney General to conduct *any* antitrust investigation and, for this reason, none of the documents sought remotely could be relevant. *That* is the narrow type of circumstance in which the Fourth Amendment has been summoned to review a state administrative subpoena. And that undisputedly is not this case, or even close to it. Google thus has no plausible relief on this claim, let alone a likelihood of success.

### D. The Balance of Harms Scales and Public Policy Tips Sharply Against an Injunction.

A balancing of the equities tips heavily, if not completely, in favor of the State. The interests implicated from the Attorney General's perspective are grave, and they include: (i) the Legislature's intent and ability to set forth a statutory

framework for the protection of consumers; (ii) the Executive Branch's authority, through the Attorney General, to investigate and prosecute (if necessary) either civil or criminal violations of the State's consumer protection laws; and (3) the State's judiciary's right and obligation to be the first line of defense in interpreting, applying, and enforcing the laws of the State.

On the other side of the scale, Google offers little, aside from guised attempts at forum shopping. Google never has suggested that the subpoena, *in toto*, requests information *potentially* protected by federal law. And Google never has suggested how making the same arguments in state court could amount to irreparable harm. In fact, if there actually is anything to Google's insistent defenses, the company readily could assert them in state court to get the subpoena quashed.

The end result of the granted injunction tips the scales even more. While the Attorney General's statutorily-authorized investigation has been halted in its infancy, Google's investigation into the Attorney General's investigation is ongoing. ROA.2212-2214. In the name of the Federal Rules of Civil Procedure, Google is getting a preview into why it was being investigated in the first instance. Such a precedent not only sets a dangerous roadmap for future potential offenders, but allowing the injunction to stand would amount to a draconian usurpation of the State's sovereignty.

### E. Alternatively, and Additionally, *Younger* Abstention is Required.

Google's request for relief strikes at the heart of *Younger* abstention.[15] *Younger*'s three-part test is well-established and satisfied here. *Wightman v. Texas Supreme Court*, 84 F.3d 188 (5th Cir. 1996); ROA.1278-1284. ***First***, Google does not seriously argue that it does not have an adequate opportunity for judicial review in state court, as it can, among other things, file a motion to quash the subpoena. *See, e.g., DeSpain v. Johnston*, 731 F.2d 1171, 1177 (5th Cir. 1984).

***Second***, compelling state interests are implicated. The enforcement of subpoenas issued pursuant to valid state statutory authority that only is enforceable in state court is an important state interest, especially given the consumer protection statutes under which the subpoena was issued. *See, e.g., Cuomo v. Dreamland Amusements, Inc.*, 2008 WL 4369270, at *1 (S.D.N.Y. Sept. 22, 2008).

***Third***, there is an ongoing proceeding. While there currently is no filed lawsuit, this Circuit has recognized that "*Younger*'s applicability has been expanded to include certain kinds of civil and even administrative proceedings that are judicial in nature." *Texas Assoc. of Business v. Earle*, 388 F.3d 515, 520 (5th Cir. 2004). As explained in *J. & W. Selieman & Co. v. Spitzer*, No. 05 Civ. 7781, 2007 WL 2822208 (S.D.N.Y. Sept. 27, 2007), it long has been established that "the

[15] *See, e.g., Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 68 (1st Cir. 2005) (standard of review for *Younger* in a preliminary injunction appeal).

issuance of compulsory process, including subpoenas, in criminal cases, initiates an 'ongoing' proceeding for the purposes of *Younger* abstention." *Id.* at **15-16.

The logic of such decisions mandates the same conclusion in the civil enforcement context:

> [t]he reasoning supporting these decisions applies with similar force to the contested [investigatory administrative] subpoenas. Although the contested subpoenas are not part of a criminal proceeding, they were issued by the Attorney General pursuant to an investigation of Plaintiffs' allegedly illegal activities…*Younger*'s principles extend to civil and administrative proceedings…They are an 'integral part' of a potential proceeding against Plaintiffs, and without such subpoenas, the Attorney General 'seldom could amass the evidence necessary' to commence fraud actions.

*Id.* at *5 (internal citations omitted).[16]

The Supreme Court's opinion in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) does not change this. The Supreme Court there "clarif[ied] and affirm[ed] that *Younger* extends to the three 'exceptional circumstances' identified in *NOPSI*, but no further." *Id.* at 593–94. Here, it is *NOPSI* and its

[16] *MPHJ Tech. Investments, LLC v. Sorrell*, No. 2:14-CV-191, 2015 WL 3505224, at *3 (D. Vt. June 3, 2015); *Cuomo*, 2008 WL 4369270; *Mir v. Shah*, 2012 WL 6097770, at *3 (S.D.N.Y. Dec. 4, 2012) *aff'd*, 569 F. App'x 48 (2d Cir. 2014); *Kaylor v. Fields*, 661 F.2d 12177, 1182 (8th Cir. 1981); *Empower Texans, Inc. v. Texas Ethics Comm'n*, 2014 WL 1666389 (W.D. Tex. 2014); *Iglecia v. Serrano*, 882 F. Supp. 26, 29 (D.P.R. 1995); *In re: Subpoena Duces Tecum*, 228 F.3d 341, 348 (4th Cir. 2000) (subpoena issued by an attorney general "commences an adversary process during which the person served with the subpoena may challenge it in court before complying with its demands. As judicial process is afforded before any intrusion occurs, the proposed intrusion is regulated by, and its justification derives from, that process").

progeny that lend support to abstention. Indeed, *NOPSI*'s second "circumstance" was civil enforcement proceedings. *Id*. at 584.

In *NOPSI*, the Court said that, "[w]hile we have expanded *Younger* beyond criminal proceedings, and even beyond proceedings in courts, we have never extended to proceedings that are not 'judicial in nature.'" *NOPSI v. Council of City of New Orleans*, 491 U.S. 350, 369-71 (1989). "[J]udicial in nature means *a state process* that investigates, declares and enforces liabilities as they stand on present or past facts under laws supposed to already exist." *Id*. (emphasis supplied).

Under the MCPA, the Attorney General may "issue cease and desist orders to persons suspected of violating any provision" of the consumer protection law, § 75-24-27(b); "conduct hearings in aid of any investigation or inquiry;" and "enter into an assurance of voluntary compliance or an assurance of voluntary discontinuance with any person for settlement purposes." § 75-24-27(1)(d), (g). As part of the MCPA's statutory framework, the Attorney General also may "issue subpoenas and subpoenas duces tecum," § 75-24-17, as he did here. Under the "state process," too, the subpoenas are enforced by a state court. This comports with the type of "judicial functions" in which this Circuit held meets the *Younger* test. *Earle*, 388 F.3d at 520. *Sprint* did not overrule *Earle*, and this matter falls within the category of proceedings recognized by *NOPSI* and affirmed by *Sprint*.

While *Younger* applies, its exceptionally rare "bad faith" exception does not. The lower court issued an unprecedented injunction after finding that there "*may*" be evidence of bad faith. ROA.2097. The court's opinion, in this regard, both is misguided and unmoored from any accurate reading of the law.

For example, the court reasoned:

> . . . the Attorney General made statements, on multiple occasions, which purport to show his intent to take legal action against Google *for Google's perceived violations.*

ROA.2097. This does not meet the narrow bad faith standard—or even get close to it.

The Supreme Court has emphasized that the bad faith exception provides a "very narrow gate for federal intervention in pending state [ ] proceedings." *Kugler v. Helfant,* 421 U.S. 117, 124 (1975). Indeed, "since *Younger,* no decision of the Supreme Court has found the bad faith exception applicable." *Motel 6 Operating, L.P. v. Gaston Cnty., N.C.,* No. 3:08-CV-00390-FDW, 2008 WL 4368478, at *4 (W.D.N.C. Sept. 18, 2008); *Kalniz v. Ohio State Dental Bd*., 699 F. Supp. 2d 966, 973-74 (S.D. Ohio 2010).[17] Bad faith harassment "generally means that a prosecution has been brought without reasonable expectation of obtaining a valid

[17] "While the Supreme Court has not ruled out use of the bad faith exception in civil cases, *see Huffman,* 420 U.S. at 611, 95 S. Ct. 1200, it has never directly applied the exception in such a case, and we have only recognized it in the criminal context . . . Such an exception must be construed narrowly and only invoked in 'extraordinary circumstances.'" *Tony Alamo Christian Ministries v. Selig,* 664 F.3d 1245, 1254 (8th Cir. 2012). Cases like this underscore just how narrow the exception must be construed.

conviction." *Kugler*, 421 U.S. at 121 n.6; *Rucci v. Mahoning Cnty.*, No. 4:11CV873, 2011 WL 5105812, at *7-8 (N.D. Ohio Oct. 26, 2011) ("bad faith prosecution exception is not available where the pending claims *could be presented in state proceedings* and there is no allegation of impermissible bias *on the part of the state judiciary* . . .") (citing *Moore v. Sims*, 442 U.S. 415 (1979)).

Here, there has been no prosecution initiated; information pursuant to valid authority has been sought;[18] Google may raise its claims in state court; and the Attorney General has deconstructed Google's claims that the subpoena only seeks material for which Google enjoys some type of (future) federal immunity. Issuing an administrative subpoena because there is reason to believe a company may be engaged in unlawful conduct does not constitute bad faith, and *Younger* mandates abstention.

## III. The District Court Erred in Enjoining the Attorney General from Brining Future and Hypothetical Civil or Criminal Charges.

The second-prong of the injunction is worse than the first. Or it is an advisory opinion that means nothing at all. It prohibits the Attorney General from "bringing a civil or criminal charge against Google under Mississippi law for

[18] *DeSpain v. Johnston*, 731 F.2d 1171, 1180 (5th Cir. 1984); *Spitzer*, 2007 WL 2822208, at *7; *Younger*, 401 U.S. at 51; *Rucci*, 2011 WL 5105812, at *7-8 n. 4.

making accessible third-party content to Internet users." ROA.2025.[19] This cannot withstand appellate scrutiny.

### A. The Injunction Does Not Pass Muster Under Federal Rule 65.

On its face, the injunction fails. The court's injunction is not limited in time, and it bars the State's top law enforcement official from ever bringing a lawsuit or a criminal charge against Google. While Google attempts to staple the CDA's third-party content protection to the injunction to make it appear narrow, it is not.

At best, the court's injunction simply is a restatement of federal immunity and thus an overbroad advisory opinion. At worst, the injunction is an insincere attempt on the part of Google to expand the CDA, so as to provide Google with a level of immunity that Congress has not offered. Either way, the injunction fails Rule 65's threshold requirements.[20]

The injunction *first* presumes that the Attorney General purposefully will file a lawsuit he knows he cannot win due to the CDA, something that the Attorney General expressly has disavowed. Even with this fallible presumption, though, safeguards, *e.g.*, Rule 11, already are designed and built into the rules of procedure to deal with any such vexatious litigation.

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[19] The injunction itself actually is even more imprecise: "The Attorney General will not be able to move on matters at issue herein, namely, the enforcement of the subpoena and the *filing of charges against Google*." ROA.2107.

[20] *See* FED. R. CIV. P. 65(d); *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); *Seattle–First Nat. Bank v. Manges*, 900 F.2d 795, 800 (5th Cir. 1990).

*Second*, the injunction fails because it presupposes, incorrectly, that the question of federal immunity never can be a question of fact. This is belied by the fact that Google and others have lost legal battles at the Rule 12(b)(6) stage, since the question of whether the conduct is all third-party content or is otherwise immunized often is a "fact-intensive" inquiry.

*Third*, the lower court's injunction leaves the Attorney General open to a contempt proceeding should he *ever* file a lawsuit against Google –*and lose*. This absurd consequence begs a host of unanswerable questions:

- If the Attorney General files a suit in state court, disagrees with Google on the issue of immunity, and wins at Rule 12(b)(6) but loses at trial, can the Attorney General, at that point, be held in contempt for violating the injunction?

- Alternatively, what happens if the Attorney General wins the future lawsuit? Is the injunction void? Or is the injunction void if the Attorney General even can nudge a claim by a motion to dismiss?

- Even worse, does the Attorney General have to file a declaratory judgment in federal court and "win" before a federal fact-finder on the fact issues of immunity before he is permitted to initiate a suit in state court?

All of this is unknown, and all of it collides with the direct mandates of Federal Rule 65. Plainly put, the relief provided in the injunction does not work, and Google's attempt to shoehorn categorical immunity not offered by Congress into a judicial injunction is improper.

### B. Google Cannot Demonstrate a Likelihood of Success.

The likelihood of success arguments cannot be divorced from the relief provided. The "third-party content" portion of the injunction directly is married to the CDA's immunity. To the extent it could be said to bear a tangential relationship to the Fourth Amendment or to preemption, those claims would fail for the same reasons already discussed.

#### *i. The Communications Decency Act.*

Through legislation, Congress could have offered Google and similar companies a blanket legal exemption, similar to that in *Crist*. It did not. Prohibiting an investigation and the filing of future "charges" judicially creates the level of immunity that Congress declined to afford. This is unwarranted. The injunction also is specious. It presumes to decide whether legal exceptions to immunity apply *before* any lawsuit may be filed (and before facts can be compiled), and it wrongly presupposes that immunity never can turn on a question of fact.

The bottom line is that, here, the CDA offers Google a potential defense, *if* a lawsuit ever is brought. The CDA does not preclude the Attorney General from gathering facts to determine whether immunity applies; the CDA does not prohibit asking a state court to enforce a subpoena; and the CDA for sure does not offer Google an avenue for garnering a sweeping, anticipatory federal injunction to a state lawsuit not yet even framed.

### *ii. The First Amendment.*

Google also has maintained that the filing of a future lawsuit might infringe on or chill its First Amendment rights. For example, Google says it must "either conform its protected speech to the preferences of the Attorney General or face burdensome demands for information and risk civil or criminal prosecution." ROA.1556.

Such an argument, *first*, overlooks the third option Google seeks to discard: quashing the subpoena in state court. *Second*, in its complaint, Google did not point to any law that supposedly infringes on its speech. *Cf Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled *to challenge a statute* that he claims deters the exercise of his constitutional rights.").

Later, however, Google changed course. In *a footnote*, it argued that it is alleging "that applying the MCPA to bar Google from making available third party content to internet users violates the First Amendment . . . ." ROA.1529. Such a purported "as-applied" challenge is a non-starter. The MCPA has not yet been applied, much less applied to bar any conduct, and the subpoena does not focus on third-party content, but on whether Google's own conduct is violative of state law.

In addition, such challenges are not opportunities to speculate,[21] and the district court did *not* undertake a true as-applied analysis of the law.

Also telling of the injunction's legal shortfalls is the relief provided. The injunction endeavors to prohibit a lawsuit against Google "for making accessible third-party content to Internet users." This seems simple on the legal surface, but what lies beneath are the facts necessary to get there. To reach the relief afforded, one would have to deduce, *in a factual vacuum*, that the content all *is* information created by third parties, and that the Attorney General was investigating only third-party content, which he undisputedly was not.

Unless law enforcement always is required to rely *solely* on the word of the person or entity being investigated (*e.g.*, Google's self-serving affidavits), the question of whether the conduct is actionable or protected is only one that may be answered through an investigation. That is, one is required to "peek under the hood" to be able to engineer the legal result on a properly developed factual record. If Google is participating in unlawful or criminal activities, its conduct is neither categorically immunized nor altogether shielded by federal law.

This is why the lower court's injunction gets it wrong. Put simply, the facts necessary to adjudicate, or even assess, Google's First Amendment protection

[21] *Hosemann*, 771 F.3d 285; *In re Cao*, 619 F.3d 410.

contentions remain to be investigated, and the factual record now is insufficient to determine whether any of the possible exceptions to such protection apply.

### C. There is No Irreparable Harm, and Google's Claims of Such are Speculative.

Prohibiting the filing of a future lawsuit presumes that an investigation is complete. But this is what injunction one disallows. At most, then, Google's claim of irreparable harm amounts to one from a lawsuit that may or may not ever be filed.[22]

On this, Google's threat of harm argument is insincere.[23] The so-called (*and invented*) threat of prosecution at the root of Google's argument occurred in previous years, including 2013. ROA.397-398. For example, Google refers to comments that the Attorney General made on June 10, 2013. ROA.397-398. On that day, the Attorney General informed Google that it was being "investigat[ed]" and "[o]ne of the many potential outcomes of the ongoing investigation *could be* civil or criminal litigation arising under state law." ROA.397.

Of course, neither at that time nor any other time during the dialogue between Google and the Attorney General did Google rush to court to stop any urgent irreparable harm. To the contrary, Google continuously told the Attorney

[22] *Contra Bronx Household of Faith v. Board of Educ*., 331 F.3d 342177 (2d Cir. June 6, 2003 ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.").

[23] *Piscottano v. Murphy*, 317 F. Supp. 2d 97, 102 (D. Conn. 2004) ("[P]laintiffs invoking the First Amendment do not always get a free pass on irreparable harm").

General that it "wishes to continue our substantive engagement with you and other Attorneys General on the important issues raised in your letter" and that it "welcome[s] hearing about instances in which our services are being misused . . ." ROA.651. Even in the two months *after* the issuance of the subpoena, Google did not exercise the legal options at its disposal (*e.g.*, moving to quash), and this is despite its purported claims of urgent harm.

Under correct legal standards, the company's irreparable harm contentions do not fit. Google's own case citation reveals why. Google cites to *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), but the situation in *Morales* was different in a critical way. There, state attorneys general had issued guidelines to the airlines industry about unfair advertising practices and sent a letter to carriers making clear that their practices constituted a violation of state laws. *Id.* at 379. Indeed, the states' express "purpose . . . [was] to clarify for the industry . . . that [the practice] is a violation of [ ] state law" and that they were sending a "formal notice of intent to sue." *Id.*

That is not this. Far from any "immediate threat" of harm, the Attorney General only now has *requested information* pursuant to his authority under state law—authority in which Google does not once challenge. *Contra id.* at 382. Even in *Morales*, the Supreme Court admonished the district court for "disregard[ing] the limits on the exercise of its injunctive power." *Id.* at 382.

The injunction Google sought and received in this matter is the type of "blunderbuss injunction" that *Morales* counseled against. *Id.* Indeed, the injunction seeks to "determine the constitutionality of state laws in hypothetical situations where it is not even clear that the State itself would consider its laws applicable." *Id.* It is evident from the court's grant of the injunction that *Morales*'s warning has gone unheeded.

Overall, at this investigatory juncture, the Attorney General seeks only information—that only a state court can compel. Google can respond to the subpoena, or it can choose not to and challenge it in state court. The company has many options, but a sweeping and indeterminate federal injunction cannot be one of them.

### D. The Balance of Harms and Public Interest Inquiry are Not Even Close.

On injunction two, the preliminary injunction ledger is not near balanced. It prohibits the State of Mississippi from pursuing future "charges" against Google under state laws that are designed to protect against conduct that violates the public interest. "[A]ny time a State is enjoined by a court from effectuating statutes created by representatives of its people, it suffers a form of irreparable injury. *New Motor Vehicle Bd. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977) (Rehnquist, J.).

It is a long-standing principle accepted in this nation's history that the interests of a sovereign State in legislating, investigating, and potentially enforcing its own laws should not be judicially commandeered by a federal court lightly. But, that precisely is what has occurred here, and in the most untenable way: judicially suggesting that Google is immune from investigation, state law, and state court. Even in the absence of this matter falling within *Younger*'s domain, it was incorrect for the lower court to cast aside the profound notions of federalism, equity, and comity that underpin *Younger*. *See, e.g., Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22 n.22 (1983) ("[C]onsiderations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it").

In the end, the court's injunction goes not one, but two, steps too far. Enjoining the Attorney General from asking a state court to enforce the subpoena was a presumed misunderstanding of federal law, and prohibiting the filing of future "charges" was a gross misapplication of it.

## IV. Additionally, and Alternatively, Google's Claims are Not Ripe and Defenses do not Confer Subject Matter Jurisdiction.

### *i. Ripeness.*

As this case is still in the investigatory stages, it is not ripe for adjudication. The doctrine of ripeness, as a doctrine of justiciability, is "drawn from both Article III limitations on judicial power and from prudential reasons for refusing to

exercise jurisdiction." *Reno v. Catholic Social Services*, 509 U.S. 43, 57 n.18 (1993); *Orix Credit Alliance v. Wolfe*, 212 F.3d 891, 895-96 (5th Cir. 2000).

Google asks this Court to speculate about claims the Attorney General *may* bring in the future based on its unilateral interpretation of the documents sought in the subpoena. However, it is the Attorney General, and not Google, who is in the best position (and statutorily authorized) to determine what claims may be brought against Google under the MCPA, if any ever are brought at all.

Obviously, the Attorney General cannot now ascertain the information the subpoena would elicit. If the subpoena were to reveal conduct that violates the MCPA and for which Google is not immunized, the Attorney General may then proceed under the MCPA. *Texas Lawyers Ins. Exch. v. Resolution Trust Corp.*, 822 F. Supp. 380, 385 (W.D. Tex. 1993). But we are not there yet. *Compare Laird v. Tatum*, 404 U.S. 1, 11 (1972) (federal court jurisdiction not invoked by a party who alleges his rights are being "chilled by the mere existence without more, of a governmental investigative and data gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose") *with* ROA.59 ("The Attorney General's <u>*Inquiry*</u> is not the least restrictive means of accomplishing any compelling governmental purpose. . .").

The Attorney General, at this juncture, only has requested information, and Google's claims force the Court to assume that the Attorney General would bring an action that violates federal law. There is no basis, in either fact or law, for such an assumption. Because much factual development of the case still remains, Google's claims are not ripe—or, at a minimum, they do not warrant an injunction.

***ii. Federal Question Jurisdiction.***

The Attorney General recognizes that, normally, this jurisdictional argument would come at the very beginning of the analysis. In this instance, though, an initial examination of the nature of Google's so-called claims sheds important light on the jurisdictional arguments.

Google alleges that this case presents a "federal question" under 28 U.S.C. § 1331. ROA.21. Federal question jurisdiction, however, "is not satisfied merely because the dispute is in some way connected with a federal matter." *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1178 (5th Cir. 1984) (citation omitted); *Wycoff Public Serv. Comm'n v. Wycoff*, 344 U.S. at 248. Filing a suit using the Declaratory Judgment Act ("DJA"), as a procedural vehicle like Google did here, does not change this—or separately confer jurisdiction. *Jolly v. United States of America*, 488 F.2d 35 (5th Cir. 1974); *Superior Oil Co. v. Pioneer Corp*., 706 F.2d 603, 605 (5th Cir. 1983)).

"[A]lthough the presence or absence of a federal question normally turns on an examination of the face of the plaintiff's complaint, in an action for declaratory judgment the positions of the parties are reversed: the declaratory-judgment plaintiff would have been the defendant in the anticipated suit whose character determines the district court's jurisdiction." *Rauner v. Am. Fed'n of State, Cnty., & Mun. Employees*, No. 15 C 1235, 2015 WL 2385698, at *2 (N.D. Ill. May 19, 2015). As the Supreme Court stated, "if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." *Franchise Tax Bd.*, 463 U.S. at 16 (quotations removed); *Skelly Oil Co. v. Phillips Petroleum Co*., 339 U.S. 667, 671-72 (1950); *Rauner*, 2015 WL 2385698, at *2 ("[T]he existence of a federal defense is inadequate to confer jurisdiction . . . even if the constitutional defense is the only real issue in the case."); *Gaar v. Quirk*, 86 F.3d 451 (5th Cir. 1996).[24]

Here, the "action" is an administrative subpoena issued under state law, and Google has asserted anticipatory preemption and CDA defenses.

[24] According to *Garr*, there are only two exceptions to the rule concerning defenses to asserted state law claims: (1) the artful pleading doctrine; and (2) when federal law completely preempts state law in that area. *Gaar*, 86 F.3d at 454 n.11. As in *Garr*, neither exception applies here.

### *iii. Lack of Jurisdiction over Google's Defenses*.

Google's preemption and immunity defenses do not create an independent jurisdictional basis.[25] The starting point for this analysis is the case law on which Google and the district court relied. One of Google's chief case citations was to *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). There, the Supreme Court stated a familiar rule: "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."

The Attorney General does not contend that federal courts cannot enjoin state officials under the appropriate circumstances. *Cf. Okpalobi v. Foster* 244 F.3d 405, 416 (5th Cir. 2001) (citing *Ex Parte Young*, 209 U.S. 123, 155-56). The relevant inquiry, though, is not whether federal courts *can* enjoin state officials, but *when*.

In the lower court, Google's retort to this argument was to offer footnote 14 from the *Shaw* decision. That footnote explains that federal jurisdiction is proper under § 1331 where a plaintiff seeks injunctive relief from *state regulation* on grounds that such regulation is preempted by a federal statute. *Shaw,* 463 U.S. 85 n.14. That is unhelpful for purposes of this analysis. Google does not contend that any state *statute or regulation* is preempted by federal law. Google, instead, argues

[25] The Attorney General acknowledges that Google urged a § 1983 action under the First and Fourth Amendments. Why there is no Fourth Amendment claim is discussed both *supra* and *infra*. The Attorney General also acknowledges that courts *in general* have jurisdiction over First Amendment retaliation actions, but here that claim is not cognizable and certainly does not have a likelihood of success.

(incorrectly) that *some* of the information sought in the subpoena *might* be preempted *depending* on the claim the Attorney General *might* file in the future. *Shaw*'s holding simply is not that elastic.

Google also attempted to find jurisdictional traction in the cases of *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) and *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519 (2009). Those cases do not provide Google with an avenue to Article III. In *Morales*, the National Association of Attorneys General adopted travel enforcement guidelines after federal deregulation of the airlines. *Id.* at 379. Thereafter, several attorneys general directed airlines to bring fare advertisements in line with those NAAG guidelines. *Id.*

The federal deregulation statute at issue in *Morales* expressly prohibited states from regulating rates and fares and concluded "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services, are pre-empted under 49 U.S.C. App. § 1305(a)(1)." *Id.* at 384. Unlike the published guidelines in *Morales*, which expressly were preempted by federal law, Google tries to extrapolate putative claims from the contents of the subpoena to then argue the Copyright Act and/or the FDCA preempts the subpoena.

Likewise, Google's citation to *Cuomo* does not rework the proper jurisdictional outcome. There, the Attorney General of New York sought documents from national banks. The defendant moved to enjoin the request

because the National Bank Act and its implementing regulations expressly prohibited state officials from exercising "*visitorial powers*" over national banks. *Id.* at 524. No similar federal statute proscribes the Attorney General's subpoena.

The district court also relied *Voicenet Comm. Inc. v. Corbett*, 2006 WL 2506318 (E.D. Penn. August 30, 2006) as basis for jurisdiction under the CDA. There, plaintiffs alleged a violation of their rights under the CDA due to the execution of a search warrant and enforcement of state law, which criminalized the knowing distribution and possession of child pornography. *Id.* at *1. The Attorney General concedes that the district court there said the CDA conferred an enforceable right under § 1983, but it stands alone in that proposition. *Contra Klayman v. Facebook, Inc*., 753 F.3d 1354, 1357 (D.C. Cir. 2014) ("[p]reemption under the [CDA] is an affirmative defense. . . .").

Further, the Attorney General has not "seized" any of Google's materials, as in *Corbett*, and Google does not contend that the MCPA is inconsistent with the CDA. The Attorney General only has requested information, and *only a state court can enforce that request*. The CDA and federal preemption thus are being used as preemptory defenses to a future *state law* cause of action—one that may or may not ever be brought. *If* a suit under the MCPA ever is brought, Google can raise its immunity/preemption defenses and have its day in court—just not federal court and just not *today*.

Finally, the Fourth Amendment issue raised in this litigation warrants further consideration. There is no likelihood of success, but the "Fourth Amendment" also would amount only to an "overly broad" defense, if to anything at all, in state court because it is being used as a subpoena narrowing device. For its Fourth Amendment action, Google places its eggs in one legal basket: *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003).

As noted, the subpoena issued in *Crist* fell squarely within the "business of baseball" exemption from federal antitrust law, and it was clear that the conduct being investigated could not possibly violate *any* state antitrust laws. *Id.* at 1186. Significantly, in invoking the Fourth Amendment, the court in *Crist* only had to look to the four corners of the face of the subpoena to decide the issue. *Id.*; *accord NOPSI*, 491 U.S. at 363 ("no inquiry beyond the four corners … needed to determine whether it is facially pre-empted.").

That is not the case here. Google's claim centers on the *scope* of the subpoena. Google thus is invoking the Fourth Amendment as a method to *narrow* a purportedly over-broad state administrative subpoena. If Google's logic is accepted, the Fourth Amendment will be transformed from an instrument to prohibit unlawful search and seizure into a mechanism for initial review in federal court of all state administrative subpoenas. Following Google's rationale, the federal courts will be required to parse through document requests and narrow state

administrative subpoenas if and when the recipient of the subpoena thinks it may be overly broad.

This is a perverse exercise of federal jurisdiction, and procedurally wrong. Indeed, even if the federal courts are to be the "first stop" for narrowing state administrative subpoenas, the federal courts cannot be the "last stop," as the state court is the only one that can *enforce* the subpoena. Whatever else might be said about *Crist*'s holding, it is not that.

## CONCLUSION

The preliminary injunction remedy always has been considered an "extraordinary and drastic remedy, not to be granted routinely." *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). Not anymore. In one fell swoop, specific immunities provided by federal law have been judicially expanded; an investigation under unchallenged state authority halted; future hypothetical "charges" are precluded; and a State's sovereignty has been usurped.

Simply because a federal court has federal power to issue an injunction does not mean it always can, or even always should. Indeed, on this occasion, the exercise of that power was wrong on many fronts. This Court should analyze the several paths to reversal and overturn the unprecedented preliminary injunction under one of them.

This, the 22nd day of June, 2015.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI, in his official capacity**

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This brief complies with the type-volume limitation of Fed R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), it contains 13,921 words.

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SO CERTIFIED, this the 22nd day of June, 2015.

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## CERTIFICATE OF SERVICE

I, Krissy C. Nobile, do hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following counsel of record:

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This, the 22nd day of June, 2015.

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